Provisional

For participants only

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Provisional summary record of the 3324th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 20 July 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Protection of the environment in relation to armed conflicts (A/CN.4/700) (*continued*)

The Chairman invited the Special Rapporteur to sum up the debate on her third report on the protection of the environment in relation to armed conflicts.

Ms. Jacobsson (Special Rapporteur) said that the debate at the current session had been very rich, and she was grateful to the members of the Commission for their constructive statements, which, as she had underlined previously, were one of the two most important elements of the collective work of the Commission, along with the work in the Drafting Committee. As was her usual practice, she would not name the colleagues who had made comments, criticisms or proposed amendments, but she wished to highlight that Mr. Candioti had brought up an essential general issue related to working methods in the Commission, which would have to be addressed.

She would begin with a few remarks on the methodology. While the members of the Commission seemed to continue to appreciate the temporal approach used, certain challenges that arose from it had been identified. One concern was that some of the proposed draft principles, including draft principle 1-1 to which she would return later, had been placed in a particular temporal group even though they also covered other temporal situations. It was both a practical and a substantive problem. She recalled that it had been the Drafting Committee's decision, and not hers, following the consideration of the second report, to arrange the draft principles — which she had simply numbered from 1 to 5 — on the basis of the different temporal phases covered by the topic. Accordingly, separate parts, modelled on the temporal phases, had been created. She had never been entirely satisfied with that solution, as she realized that difficulties would arise in relation to future work. Her objective in deciding to arrange the work around the three temporal phases of armed conflict had been to facilitate the research and analysis of the topic, as it was so extensive, and not to reproduce that structure in the draft principles themselves. If the division by phases was to be maintained, she would be in favour of the tentatively entitled part four "Additional principles" being replaced with a new part entitled "Principles of general application", to be inserted at the beginning of the text. Another option would be for the Drafting Committee to abandon the idea of arranging the draft principles by temporal phase and go back to a simple numerical order.

In response to the various comments made concerning the research underpinning the report, she noted that in many respects the topic represented a new area of legal development, as reflected in the case law. On the one hand, courts adjudicated on the basis of the cases brought to them and, on the other, States and individuals brought cases only if there was a viable chance of success, procedurally and materially. That meant that some cases on the environmental effects stemming from an armed conflict might have been addressed from a different angle than protection of the environment in relation to armed conflicts, which gave the impression that they related to property rights or human rights. She considered that case law to be of relevance to the topic, however, and had thus decided to include it in her report.

The section on treaties that were of particular relevance to the pre-conflict and post-conflict phases had been introduced to meet the concerns of certain colleagues who considered that the previous reports did not contain a sufficiently detailed analysis of the environmental and other relevant treaties applicable during an armed conflict. While certain members of the Commission had expressed doubts as to the appropriateness of having a section on investment agreements, others had welcomed it and even recommended that it should be expanded and updated. She was of the firm view that the section was relevant and important, as international investment agreements illustrated the fact that environmental protection was incorporated into the treaties — friendship, commerce and navigation treaties — expressly listed by the Commission as among those that had an implication of continued application during armed conflict in its work on the effects of armed conflicts on treaties.

She was puzzled by the comments made by members who considered that certain issues were outside the scope of the topic since they did not relate to the phase during an

armed conflict, and recalled that the title of the topic was "protection of the environment in relation to armed conflicts", and not "protection of the environment during armed conflicts". Neither the report nor the draft principles were intended to be limited only to the period of conflict. In fact, it would be a contradiction to write a whole report on the post-conflict phase if the draft principles were intended to be applicable only during the armed conflict. In that regard, several members of the Commission had suggested that phases I and III (before and after the conflict) should be limited to the periods immediately before and immediately after the hostilities, respectively. From a legal perspective, such a division seemed difficult to put into practice, as it implied the existence, in parallel to the law of armed conflicts and peacetime law, of a separate body of law, *jus post bellum*, a concept that, as she had explained in her report, was the subject of discussions which she had refrained from addressing, as she was not convinced that they reflected the current state of the law. That did not mean that the Commission could not return to that interesting question in the future, but she believed that it would be premature at the current stage and probably not helpful to the progress of the work on the topic. Furthermore, she was convinced that the amendments by the Drafting Committee and the insertion of appropriate explanations in the commentaries would respond to the concerns of those who had requested a clear temporal boundary.

Other members of the Commission had rightly argued that some of the proposed draft principles should be drafted in such a way that the connection with protection of the environment was clearer, and the text would be amended accordingly. She would return to some aspects of that issue when she discussed the content of individual draft principles.

With regard to the future programme of work, she thanked those members who had carefully read the corresponding section of the report, in which she had given examples of what might merit being addressed by the future Special Rapporteur for the topic. For those who considered that that section of the report was too short, she stressed that it was deliberately brief, as it would be for her successor to decide how to proceed. Several members of the Commission had raised issues concerning civil and criminal responsibility. She had not addressed those aspects in her third report, as she believed it would be preferable to examine them at a later stage, when the entire set of draft principles had taken shape.

Turning to the observations on the draft principles, she noted that some members of the Commission had considered that draft principle 1-1 was drafted in overly general terms, and that some clarification of the measures envisaged was required. That draft principle covered all types of legislative, but also administrative, measures that a State needed to take in order to meet its obligations to strengthen the protection of the environment in relation to armed conflicts. As currently worded, it covered, for example, measures to ensure that the weapons review obligation was met, to make the judicial system available for cases related to the protection of the environment in relation to armed conflicts, or to ensure that the measures taken by a State in the context of peace operations met environmental standards. She proposed drawing up an indicative list of measures to include in the draft principle if it was referred to the Drafting Committee.

Regarding draft principle 1-3, some members of the Commission had questioned the connection between status of forces agreements and armed conflict, while others had considered that such agreements clearly came under the scope of the topic. She stressed again that the title of the topic was protection of the environment in relation to armed conflicts, and that marking, reconstruction and prevention measures that might be provided for in status of forces agreements in relation to toxic substances were vital elements of such protection. Modern agreements on the status of forces and status of missions marked an important development in the practice of States and international organizations, such as the North Atlantic Treaty Organization. One interesting example, which she had cited in her second report, was the status of forces agreement signed by the Republic of Korea and the United States of America in 1996, to which environmental provisions had been added in 2001. In her view, the proposal to replace "status of forces and status of mission agreements" with "special agreements" made during the debate on draft principle 1-3 was an interesting one that merited further consideration in the Drafting Committee.

Concerning draft principle I-4, the members of the Commission seemed to generally support the idea of including a provision on peacekeeping operations, even though some were concerned that portraying peacekeeping in the scope of the topic as a form of engagement in armed conflict could compromise the viability and usefulness of United Nations peacekeeping activities as a whole. In that regard, she recalled that the topic was not confined to situations of armed conflict, but also included pre-conflict and post-conflict phases, and that the United Nations Secretary-General himself had acknowledged that international humanitarian law applied to operations conducted during United Nations peacekeeping operations, as evidenced by his 1999 bulletin on the observance by United Nations forces of international humanitarian law, which was mentioned in the second report.

Some members had proposed that the aspects related to peacekeepking operations, currently addressed in draft principles I-4 and III-2, should be grouped together in a single text. She would support that proposal provided that the Drafting Committee abandoned the idea of arranging the draft principles by temporal phase.

With regard to draft principles III-1 and III-2, she would welcome further discussion in the Drafting Committee on the drafting suggestions that had been made. The comments and proposals in relation to draft principles III-3 and III-4 seemed well founded in several respects, given that the members of the Commission had agreed that, as she had pointed out in her report, remnants of war did not consist only of explosive remnants but also of other hazardous material and objects, and that some remnants were not at all dangerous to the environment or were less dangerous if they remained where they were, as was the case with mustard gas in the Baltic Sea. Critical comments had focused on what had been considered an exhaustive list, the temporal aspect and political realities.

Some members had criticized the fact that paragraph 1 of draft principle III-3 provided an exhaustive list of remnants of war that must be cleared, removed, destroyed or maintained in accordance with obligations under international law, which might limit the effectiveness of the draft principle in the future, in the light of new weapons being continuously developed. However, the wording of the paragraph was based on the law of armed conflict as it currently existed, and the remnants of war listed in it were the same as those mentioned in the corresponding treaties, discussed in paragraphs 247 to 252 of the third report, as well as the second report, and primarily involved hazardous explosive material. The list was not exhaustive and was not intended to be, as was clear from the words "and other devices". She recognized, however, that it might be helpful to reformulate the draft principle to be somewhat broader in scope, given that the ultimate aim was to strengthen the protection of the environment in relation to armed conflict. She therefore welcomed the proposals made in that respect, and would provide the Drafting Committee with a new text to ensure that other types of toxic and hazardous remnants of war were also covered.

Some members of the Commission had criticized the fact that it was not specified in draft principles III-3 and III-4 which party was responsible for removing the remnants of war after the cessation of hostilities. She stressed that it was not an omission on her part, but a deliberate choice, as the question of responsibility was primarily regulated by the law of armed conflict, as reflected by the formulation "in accordance with obligations under international law". By way of example, she cited the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices, article 3 (2) of which provided that "each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol", and article 10 of which stipulated that "High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control". Article 3 of the Protocol on Explosive Remnants of War provided that "after the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control." The reference to "parties to a conflict" denoted that the responsibility for the clearance of remnants of war was not limited to States, but could

concern other actors involved in a conflict when it came to remnants of war in areas under their control.

As she had highlighted in paragraph 19 of the report, the issue of responsibility was especially complex when it came to remnants of war at sea, due to the legal and practical issues posed by the nature of the sea. Some members of the Commission had suggested that the responsible actors who should cooperate with other competent organizations should perhaps be States having effective jurisdiction and control over the areas concerned.

It must be borne in mind that the aim of the draft principles was to enhance the protection of the environment in relation to armed conflict to the greatest extent possible. Determining responsibility for the clearance of remnants of war was a multifaceted issue, which was why paragraph 1 of draft principle III-3 had been formulated passively. The law of armed conflict illustrated that such responsibility fell not only on States but could also fall on non-State actors. The aforementioned instruments seemed to indicate that the party with the primary obligation to clear cluster munitions was the one which had jurisdiction or effective control over the affected areas at the relevant time.

At the same time, there were situations in which it was impossible to identify the responsible actor, or in which material that was now considered hazardous remnants of war had been placed or used in a manner that had been legal at the time. Nevertheless, they could still constitute a threat to the environment that needed to be remedied. Examples included leaking military vessels or dumped ammunition, as mentioned in the report. In that context, it was important to recall that the main purpose was to clear the hazardous remnants, and that was best done through cooperation.

Still in connection with remnants of war but also with draft principle III-5, she noted with satisfaction that several members of the Commission had highlighted the importance of access to information, including in the case of Bosnia and Croatia, where a lack of environmental information and, in particular, information about the placement of mines continued to cause despair. In fact, one of the examples highlighted in the report was precisely treaties on landmines and cluster munitions, and the obligation to provide information arising from them. The "transparency" section of those treaties also provided that information should be given on how the environment had been taken into account and protected throughout the removal process.

The use of the expression "without delay" in draft principle III-3 had also been criticized, as some members were of the view that formulating the obligation in that way was perhaps unreasonable and onerous. However, the wording was taken from article 10 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, which provided that "without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained".

Lastly, some members had considered that the words "at all times necessary", as used in paragraph 2 of draft principle III-3, did not make it clear to which temporal phase the draft principle applied; since the draft principle appeared in the part entitled "Draft principles applicable after an armed conflict", it was intended to apply after the cessation of hostilities, and thus in the post-conflict phase. However, the point could be clarified in the Drafting Committee and the commentaries.

Several valuable comments had been made in relation to draft principle III-5. With respect to the applicable temporal phase, the response would ultimately depend on what decision was taken concerning the structure of the draft principles. If the headings corresponding to the different temporal phases were retained, draft principle III-5 would likely be interpreted as applying to the post-conflict phase. With regard to the duty to cooperate, the connection between sharing of information and cooperation showed the importance of such an exchange of information to the extent possible in post-conflict and recovery measures. It was noteworthy in that context that, while instruments such as the Convention on the Law of the Non-navigational Uses of International Watercourses allowed for parties to withhold information related to national security, they nonetheless required the parties to cooperate in good faith, including on matters related to such information.

She had no difficulty in accepting that there were exceptions for reasons of national security or national defence, as mentioned by certain members, and she had actually given several examples of them in her reports, such as the saving clause in the Convention on the Law of the Non-navigational Uses of International Watercourses, under which the watercourse State was not obliged to provide data or information vital to national defence or security, but was still obliged to cooperate in good faith. One member of the Commission had pointed out that the sharing of information and granting access to information were two distinct obligations and required different treatment. That point should be considered if draft principle III-5 was sent to the Drafting Committee.

With respect to the practice of international organizations, a matter raised by at least one Commission member, she underlined that the Environmental Policy for United Nations Field Missions of 2009 stipulated that peacekeeping missions must assign an environmental officer with the duty to provide environmental information relevant to their operations and to promote awareness among personnel of environmental issues. The Policy also included a requirement to disseminate and study information on the environment, which would presuppose access to information that could in fact be disseminated.

The fact that the United Nations, as an international organization, was required under the aforementioned policy to facilitate the sharing of environmental information demonstrated that the contributions of international organizations could also be crucial in that regard. Another example was the European Union Military Concept on Environmental Protection and Energy Efficiency for EU-led Military Operations, which provided that, due to the many troop-contributing nations and other actors involved, early and close coordination among them and with the host nation was mandatory, and frequent information exchange was essential for the implementation of environmental protection principles and standards in planning for and the conduct of the operation.

Draft principle IV-1 (Rights of indigenous peoples) was the last draft principle proposed and the one that had garnered the most comments, mainly focused on the lack of connection between the rights of indigenous peoples and armed conflicts. Several members had considered that the issue was a human rights matter that fell outside the scope of the topic. Others, on the contrary, had welcomed the provision, and some had highlighted the need to establish an explicit connection between the rights of indigenous peoples and armed conflicts. In the course of those exchanges, it had been pointed out that, in dealing with the environmental consequences of armed conflict, States might be in direct contact with lands to which indigenous peoples had a particular connection. In her view, the protection of the environment during the post-conflict phase was precisely an area in which the rights of indigenous peoples should be recognized.

Before continuing, she wished to recall once again that the topic concerned the protection of the environment "in relation" to armed conflicts and that, as such, the rationale for the topic was to address also areas of international law other than the law of armed conflict, including human rights and environmental law. It would therefore be deplorable if draft principle IV-1 were dismissed solely on the basis that it addressed human rights. Most of the members who had expressed a wish for the establishment of a clearer and stronger connection between the rights of indigenous peoples and the protection of the environment had highlighted an essential point. In her view, the connection must be made clearer in the draft principle itself.

The sources mentioned in the report shed light on the legal instruments and jurisprudence that supported the recognized connection between indigenous peoples and their lands, territories and resources, and the obligation to seek their free, prior and informed consent. Other examples showed that the connection was particularly relevant in the context of armed conflicts. The sources included the United Nations Declaration on the Rights of Indigenous Peoples, which had been adopted relatively recently, in particular articles 29 and 30 thereof. Article 30 provided expressly that military activities should not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. It also provided that States must undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

More recently, the Special Rapporteur on the rights of indigenous peoples had emphasized that military activities should not take place in the lands or territories of indigenous peoples unless it was imperative for their security. In such exceptional circumstances, States should undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for such activities. In addition, the Chair of the Permanent Forum on Indigenous Issues, Mr. Álvaro Pop, had declared during the Forum's fifteenth session that, because of the rapid pace of globalization and processes to identify new lands to exploit, indigenous peoples were increasingly experiencing armed conflicts and militarization on their lands. There were other examples, but those mentioned showed that there was a link between the protection of the environment of indigenous peoples and armed conflict and that the issue thus did not fall outside the scope of the topic.

She therefore proposed that if, as she hoped, the Commission decided to send draft principle IV-1 to the Drafting Committee, she would draft a revised version, taking account of the comments made by the members. The new version would differ from the original in two respects: it would focus on the protection of the environment of indigenous peoples, and not on their rights, and would explain the connection to situations of armed conflict. The temporal aspect of the draft principle would also be made clearer. She hoped that those amendments would meet the concerns of the members, and proposed that all of the draft principles should be sent to the Drafting Committee.

She thanked the members for their detailed and constructive contributions, both in the plenary and in private consultations, and said that she had been very touched by the kind words addressed to her with respect to her engagement on that and other topics over the past 10 years. She also wished to thank Mr. Candioti and former member Mr. Dugard, without whom the Commission would not have begun work on the topic. They were the ones who had identified the request by the United Nations Environment Programme and the International Committee of the Red Cross that the Commission should address matters relating to the protection of the environment in relation to armed conflicts, and they had been the ones to encourage her to examine whether there was any merit to the proposal. She therefore extended her most sincere thanks to Mr. Candioti, whose advice had always been particularly valuable.

She recalled that, at the previous session, the Commission had taken note of the draft introductory provisions and the draft principles provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.870 that had been distributed in the meeting room. As could be seen in that document, in the draft principles applicable during an armed conflict (part II), the word "natural" was in parentheses. The reason for that was that, when it had adopted the document, the Commission had not yet decided whether it should use the term "environment" or "natural environment" throughout the text or whether it should use the term "natural environment" only in the draft principles that related to the natural environment during an armed conflict. She referred the members to the statement made by the chairman of the Drafting Committee at the previous session, in which he had clearly explained the point. As it did not seem to be the practice of the Commission to adopt a text containing words in parentheses, that aspect needed to be resolved or she would not be able to present the commentaries from the previous session. Since the Commission would have to decide on the use of terms before the conclusion of its work on the topic — and not at the current session, which would be premature — she proposed sending the provisionally adopted text back to the Drafting Committee for technical reasons, in other words to remove the brackets around the word "natural" in the draft principles contained in part II, and to explain the reasons for doing so in a note, as had been done for previous topics. The Commission could then adopt the draft text provisionally adopted by the Drafting Committee at the previous session. She reiterated that the intention was not to reopen the debate, as it had been agreed that it would be necessary to revisit the question of terminology.

The Chairman said that he took it that the Commission wished to send draft principles 1-1, 1-3 and III-1 to III-5, as well as draft principle IV-1, to the Drafting Committee.

It was so decided.

Provisional application of treaties (A/CN.4/699 and A/CN.4/699/Add.1)

The Chairman invited Mr. Gómez-Robledo, Special Rapporteur on the provisional application of treaties, to introduce his fourth report (A/CN.4/699 and Add.1).

Mr. Gómez-Robledo (Special Rapporteur) said that he wished to thank the members for their constructive comments and for the interest they had shown during the debate at the previous session on the topic of provisional application of treaties, which had highlighted the complexity of the topic. The discussions in the Drafting Committee on the draft texts proposed in the third report had been very stimulating and had enriched the debate. In his view, the Drafting Committee's extremely dynamic work was the natural continuation of the debate in the plenary and was very valuable. As was customary, in his introduction of the fourth report, he would give an overview of the work completed, comment on various aspects of the report and outline a road map for future work.

The objective of the first report had been to introduce the topic and define a workplan. The second report (A/CN.4/675) had essentially focused on the legal effects of provisional application. The third report (A/CN.4/687) contained an initial examination of the relationship between provisional application and other provisions of the 1969 Vienna Convention on the Law of Treaties: article 11 (Means of expressing consent to be bound by a treaty), article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), article 24 (Entry into force), article 26 ("*Pacta sunt servanda*") and article 27 (Internal law and observance of treaties). It also addressed provisional application in relation to international organizations. In that context, the Commission had relied on a memorandum prepared by the secretariat concerning the provisional application of treaties focused on article 25 of the Vienna Convention on the Law of Treaties (A/CN.4/676). Annexed to the third report was a table setting out specific examples of multilateral treaties with provisions on provisional application, membership of which was open to international organizations. The third report also included a set of six draft guidelines — based on all of the reports and debates up to that point — three of which had been provisionally adopted by the Drafting Committee. In the debate in the Sixth Committee at the seventieth session of the United Nations General Assembly, 35 States and the European Union had made contributions on the topic of provisional application of treaties, which was an increase over the previous year. In addition, 23 States had submitted comments on national practice, which had contributed to systematizing State practice.

The fourth report included an addendum containing a list of examples of recent European Union practice on provisional application of agreements with third States. The examples would be very useful when it came to drafting model clauses, the adoption of which had been recommended by many States. He had held two series of informal consultations with State representatives in New York, the first in November 2015 and the second in April 2016. The consultations had proved very useful to explain in more detail the different aspects of the reports on the provisional application of treaties, and had provided the opportunity to gather very interesting comments from representatives in the Sixth Committee. A seminar had also been held at the Faculty of Law of the National Autonomous University of Mexico in March 2016 and a meeting of experts had been convened by the legal advisor to the Mexican Ministry of Foreign Affairs in February 2016, both events demonstrating the high level of interest in the topic.

In line with the road map agreed on at the previous session based on the comments made by Commission members and representatives in the Sixth Committee, the fourth report focused on two main issues: a continuation of the analysis of the relationship between the provisional application of treaties and other provisions of the 1969 Vienna Convention on the Law of Treaties and the practice of international organizations in relation to the provisional application of treaties. With regard to the analysis of the views expressed by Member States, as of the publication of the third report, the Commission had received submissions from 19 States on their national practice. In 2016, it had received submissions from Australia, the Netherlands, Paraguay and Serbia. None of the submissions received indicated that the provisional application of treaties was prohibited under internal law. In some cases, national legislation provided for the establishment of an internal process to be followed for provisional application to be accepted, but, in general, the issue was not addressed in internal law, which showed that provisional application was

an exceptional circumstance. However, there was a growing tendency, already identified at the previous session, towards provisional application of multilateral treaties.

Turning to the analysis of the relationship between provisional application and the provisions of the 1969 Vienna Convention that had not been addressed in the third report, he recalled that the primary objective of the exercise was to provide more details on the legal regime governing provisional application by interpreting article 25 of the Convention in the light of other provisions of treaty law. For that reason, he had decided not to include the provisions of the Convention that were not necessarily directly linked to provisional application. As he had already noted in the third report, that was the case with articles 7 to 10, which referred to the requirements surrounding the adoption and authentication of the text of a treaty. Given the flexibility provided under article 25 to agree on the provisional application of a treaty, what mattered when interpreting a specific situation was establishing whether the group of States that could provisionally apply a treaty had "in some other manner so agreed" even though the treaty itself made no reference to provisional application. It would therefore be pointless to examine provisions dealing with formalities that would not necessarily allow for the provisional application of a treaty, even if they were relevant in the event that the States decided to conclude a separate agreement to establish the rights and obligations for provisional application. The same applied to articles 11, 12, 13, 14, 15 and 16, which dealt with means of expressing consent to be bound by a treaty and, by definition, determined the entry into force of the treaty for the States concerned, but which could only be used to agree on provisional application, as had been noted in the third report. Furthermore, since provisional application generally ended upon entry into force of the treaty, although that was not always the case, he had not considered it necessary to spend time on provisions of the Vienna Convention that addressed formalities that presupposed compliance with national constitutional requirements related to the entry into force of a treaty.

With regard to the reservations regime, he had not found any treaties that provided for the possibility of making reservations as of the date of the decision to provisionally apply a treaty, in full or in part, nor any provisions on provisional application that referred to the possibility of formulating reservations. Nor had he identified any cases in which a State had formulated reservations at the time of deciding to provisionally apply a treaty. The question was therefore whether, if a treaty made no reference to reservations, a State could still formulate reservations at the time of agreeing with other parties to provisionally apply the treaty in question. In principle, there was nothing to preclude States from doing so, for two reasons: the provisional application of a treaty gave rise to legal effects, and the purpose of a reservation was precisely to exclude or modify the legal effects of certain provisions of the treaty vis-à-vis the States making the reservation. In any case, a reservation made in the context of provisional application would be valid only for the period of provisional application and would have to be lodged again once the State expressed its consent to be bound by the treaty. However, it seemed to be a purely hypothetical and theoretical question, since, in practice, a State would simply have to decide to limit its consent to provisional application to the parts of the treaty that were not problematic in order to avoid having to formulate reservations, given the inherent complications involved in doing so.

With respect to the regime of invalidity of treaties, and in view of the observations made by Commission members and States, emphasis had been placed on the analysis of article 46 of the Vienna Convention in the light of article 27. First it was concluded in the report that the principle according to which a State could not invoke the provisions of its own internal law to justify non-compliance with obligations arising from a treaty was also valid when it came to provisional application. Second, after explaining the scope and content of article 46, he had gone on to examine the fundamental question of the limitation of provisional application on the basis of internal law, which had given rise to arbitral jurisprudence that was not yet firmly established. From the perspective of international law, and regardless of the outcome of the famous *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case, the possible limitation of provisional application on the basis of internal law would not derive from article 46 of the Vienna Convention since it was not an element related to the capacity to conclude the treaty in question. The issues involved in that case highlighted the need for greater clarification of the article 25 regime. In the

Drafting Committee, it had been pointed out that the issue of clauses limiting provisional application on the basis of internal law should be discussed in the context of the consideration of the draft guidelines he had proposed, and it would therefore be necessary to revisit the issue both in the plenary and in the Drafting Committee.

With regard to the termination or suspension of the operation of a treaty as a consequence of its breach, having analysed article 60 of the Vienna Convention in the report, he recalled that, in order for there to be a breach that activated that provision, there must exist a legal relationship arising from a treaty. Thus, given that the provisional application of a treaty gave rise to legal effects as though the treaty were in force, which in turn generated obligations that must be fulfilled under the principle of *pacta sunt servanda*, it could be concluded that, in the case of provisionally applied treaties, the prerequisite of the existence of an effective obligation was met and that, consequently, the conditions were in place for the suspension or termination of the treaty to be requested, in accordance with the provisions of article 60 of the Convention, on condition that there had been a serious breach of the provisionally applied treaty.

With regard to cases of State succession, State responsibility and outbreak of hostilities, reference could be made to the provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties, which illustrated the practical utility of the provisional application of treaties in contributing to legal security in situations that were generally associated with political instability within a State and that gave rise to the reconfiguration of its international relations. Given that such issues were governed by the provisions of the Convention, he had not considered it necessary to go beyond what was provided for in that instrument.

Turning to chapter III of the report on the practice of international organizations in relation to provisional application of treaties, he thanked the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat for the specific information it had sent him on its functions and methods of work, which had been very useful in the preparation of his fourth report. With regard to the Secretariat's registration function, to date, 53,453 original treaties had been registered with the United Nations, and that number exceeded 70,000 if subsequent agreements were included. That number did not reflect the total volume of treaties worldwide, since not all States registered their treaties in accordance with article 102 of the Charter of the United Nations. If, however, all treaties and the formalities to which they gave rise were taken into account, there were more than 250,000 registered items. In other words, an average of 2,400 treaties and treaty formalities were registered with the United Nations every year. Furthermore, 1,349 formalities related to the provisional application of treaties had been registered between 1946 and 2015. In the exercise of the functions entrusted to it under article 102 of the Charter, the Secretariat had registered a total of 1,733 provisionally applied treaties, classified as being in force, which gave rise to a number of problems. That category of treaties comprised both bilateral treaties and open and closed multilateral treaties. The most interesting and revealing observation gleaned from drawing up the inventory was that the extensive work of registering formalities related to provisional application was based primarily on the regulations on the registration of treaties adopted by the United Nations General Assembly in 1946, and that the criterion used for registration, in accordance with article 102 of the Charter, was the de facto equation of provisional application with entry into force when the treaty was applied provisionally by common agreement of at least two contracting parties. The Secretariat continued to apply that criterion in the exercise of its registration and publication functions, and it was also reflected in the Repertory of Practice of United Nations Organs adopted in 1955 and updated in 1966. Furthermore, with regard to the Secretariat's depositary functions, the clauses relating to provisional application and entry into force of treaties contained in instruments deposited with the Secretariat were so diverse that the Treaty Section had created varied search categories to match the possible options, which confused matters even further for those studying the subject. In his view, that state of affairs should prompt the Commission to give some thought to the function of depositary of international treaties, even though that would be a separate topic, examining whether the depositary should be considered a simple administrator of notifications or an actor with the capacity to differentiate between the requests it received from Member States and thus with a greater capacity for legal analysis than might appear at first glance — a hypothesis that

States did not seem willing to accept when it came to the United Nations Secretariat. In any case, it was clear from his work that Member States were largely unaware of the activities undertaken by the Secretariat in its registration function and as depositary of treaties when it came to provisional application; the criteria applied by the Secretariat, whether they were considered the right ones or not, derived from a decision by the General Assembly, which should, if it considered it relevant, review them to see whether they did in fact correspond to State practice. It was important to bear in mind that the regulations on the registration of treaties had been adopted prior to the Vienna Convention and had not been amended since. In that regard, one of the first concrete outcomes of the Commission's work on the topic could be a review of the regulations by the General Assembly to bring them in line with current State practice in relation to the provisional application of treaties. Such a review would also help bring practice in line with the purpose and scope of article 25 of the Vienna Convention and would then enable the Secretariat to reflect new trends in contemporary practice in that area in the Treaty Handbook, the Handbook of Final Clauses of Multilateral Treaties and the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties.

The fourth report also contained valuable information provided by other international organizations concerning their practice, including the Organization of American States, the European Union, the Council of Europe, the North Atlantic Treaty Organization and the Economic Community of West African States, and he wished to express his thanks to their legal departments for their contributions. All of the examples given by the various organizations highlighted the importance of provisional application when it came to the commitments undertaken by States at the regional level and its relationship with international organizations, as well as its frequent use in the practice of the law of treaties. Those elements would be very useful when it came to considering the model clauses he would propose at the next session, which would be an element of the guidelines intended to serve as a guide to practice on provisional application.

Further to the draft guidelines already presented to the Commission, in his fourth report he proposed a single additional draft guideline, entitled "Internal law and the observation of provisional application of all or part of a treaty", which was based on article 27 of the Vienna Convention. He recalled that, in his third report, he had proposed a draft guideline 1 which included a limitation clause that referred to the internal law of States. The Commission members had been unanimous in the view that it should not be suggested that international law was subordinate to internal law. That had not been his intention; he had merely wished to respond to the concerns expressed by a number of States that provisional application should take account of the rules of internal law. The Commission, however, like the representatives in the Sixth Committee, had considered that such a provision might weaken, even indirectly, article 27 of the Vienna Convention, which was why it had been deleted from the revised version of draft guideline 1 that he had referred to the Drafting Committee. The new proposed draft guideline was not intended to reopen the debate, but merely to add to the draft guideline on the legal effects of provisional application while taking account of the fact that the provisions of article 46 of the Vienna Convention could only be invoked within the limits of the scope of that article, namely capacity to conclude treaties. He was aware that some would argue that the text was not sufficient and that the draft guidelines should make some mention of the possibility that the agreement, in the broad sense, of the States agreeing to provisionally apply a treaty could establish a limitation based on internal law. In the light of the debate on draft guideline 1 at the previous session, however, he did not see the need to do so and believed that the issue could be addressed in the commentaries.

In conclusion, he said that he would address in his fifth report the various pending issues, such as the legal effects of the termination of provisional application of treaties that gave rise to rights for individuals, and would submit to the Commission model clauses that would be drafted on the basis of practice and could complement the guidelines by offering States and international organizations useful guidance. The report would also serve as the basis for drafting the commentaries to the draft guidelines that had already been considered by the Commission and, in some cases, adopted by the Drafting Committee.

The meeting rose at 11.35 a.m.